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DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA,
BATON ROUGE DIVISION

Civil Action No. 457

THE TEXAS COMPANY,

Plaintiff,

vs.

LUTHER S. MONTGOMERY, COMMISSIONER OF WILD LIFE AND FISHERIES, ET AL.,

Defendants

Before the Honorables, Elmo P. Lee, Circuit Judge and Ben C. Dawkins and Gaston L. Porterie, District Judges, composing the Court consisting of three judges under Section 266 of the Judicial Code as amended (U. S. Code, Tit. 28, Sec. 380):

STATEMENT AS TO JURISDICTION

I. The jurisdiction of the Supreme Court of the United States on appeal is invoked under Sections 238 and 266 of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. Code, Tit. 28, Secs. 345, 380). The judgment of the three-judge court which is sought to be reviewed by the appeal herein was entered September 26th, 1947. Application for appeal is herewith presented on September 26th, 1947.

II. The statutes of the State of Louisiana, the validity of which is involved, are Act No. 367 of the Louisiana Leg-

islature, Regular Session, of 1940 (Official Ed. pp. 1369 to 1374), and the amendment thereto, Act No. 199 of the Louisiana Legislature, Regular Session, of 1942 (Official Ed. pp. 730 to 733). The statute, as so amended, reads as follows:

AN ACT

"To create a Stream Control Commission to have control of the streams and waterways and coastal waters of the State and waste disposal therein and any pollution thereof with power to make rules and regulations governing the same and to prescribe the powers and duties of such Commission; to prohibit the harmful pollution of any waters of the State or the coastal waters of the Gulf of Mexico within the territorial jurisdiction of the State of Louisiana; to regulate and control public and private waste disposal into any of the waters of the State; to provide for the enforcement of the rules and regulations of said Commission; to define certain terms herein; to repeal all laws in conflict herewith and to provide penalties for the violation of this Act; and to preserve all rights of action of prosecution heretofore arising under any prior laws; and to preserve the efficacy of existing laws governing the pollution of rivers, streams, lakes and other waters within the State except insofar as they are in conflict herewith.

"Section 1. Be it enacted by the Legislature of Louisiana, That there is hereby created a Stream Control Commission herein referred to as the Commission, which shall consist of the Commissioner of Conservation, the President of the State Board of Health, the Commissioner of Agriculture and Immigration, the Executive Director of the Department of Commerce and Industry and the Attorney General of the State of Louisiana or their duly authorized representatives. Should any of the officers named herein have their titles changed or their offices eliminated or abolished as the result of a reorganization of any department of the State Government or otherwise, the successor of any

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such officer or the officer performing substantially the same functions shall succeed him as a member of the Commission. Each of said members may hold office and sit personally as a member of said Commission or may designate one of his assistants or a member of his staff to represent him as a member of said Commission or as his proxy at any meeting thereof.

"The Attorney General of the State of Louisiana shall be the legal adviser of the Commission.

"Section 2. That the Commissioner of Conservation or his duly authorized representative shall be Ex-Officio Chairman of the Commission. The Commission shall organize, prescribe and elect such officers as it deems necessary and make its own rules and regulations and prescribe its own procedure, except as herein provided, and shall meet at least once each month unless there is no business or hearing to come before the Commission and the meeting is waived by unanimous agreement of the members, and it shall keep a record of its proceedings. Three members of said Commission shall constitute a quorum for any meeting for the transaction of all business coming before the Commission. At any meeting of the Commission or any hearing conducted by it, or at the taking of testimony by any member or members of the Commission acting for and under the authority of the Commission, the chairman of the Commission or any member thereof presiding at such meeting or hearing or at the taking of any such testimony, shall have authority to administer oaths to any and all witnesses.

"Section 3. That the Stream Control Commission shall have control of waste disposal, either public or private, by municipalities, industries, public or private corporations, individuals, partnerships, associations or any other entity into any of the lakes, rivers and streams of the state or any tributaries or drains flowing into any of such lakes, rivers or streams and into any of the coastal waters of the Gulf of Mexico within the territorial jurisdiction of the State of Louisiana,

for the prevention of pollution thereof tending to destroy fish life, or to be injurious to the public health or the public welfare or to other aquatic life or wild or domestic animals or fowls.

"The Commission shall have authority to make and promulgate such rules and regulations and to conduct such investigations as it, from time to time, may deem necessary to carry out the provisions of this Act.

"Rules, regulations, determinations and orders of the Commission shall be promulgated by publication in one issue of a newspaper designated as the official journal of the parish or parishes affected and in one issue of the newspaper designated as the official journal of the State of Louisiana; provided that, in the discretion of the Commission, any such promulgation by publication may be confined to publication in one issue of the official journal of the State of Louisiana, and actual notice to parties affected, or, in cases where such rules, regulations, determinations and orders are applicable and of interest only to the parties affected, to such actual notice without publication.

"Section 4. That the Commission shall be authorized to bring any appropriate action in court in the name of the State of Louisiana that may appear to it to be necessary to carry out the provisions of this Act.

"Section 5. That the Department of Conservation of the State of Louisiana shall enforce and administer the provisions of this Act and the rules, regulations and orders of the Commission and the agents and enforcement officers of the Department of Conservation shall be ex-officio agents and enforcement officers of the Commission.

"This Act shall not deprive the State Board of Health of any of its duties and powers under existing laws in regard to matters directly affecting the public health, and the State Board of Health, through its officers and agents, shall continue to handle such matters.

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"Section 6. That the Commission or its authorized agents shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters of this State. The Commission shall have the right to call upon any officer, board, department, school, university, or other state institutions and the officers and employees thereof and to require the furnishing of any assistance deemed necessary to the carrying out of this Act.

"Section 7. That the Commission shall establish such pollution standards for lakes, rivers, streams, and other waters of the State in relation to the public use to which they are or may be put as it shall deem necessary. It shall have the authority to ascertain and determine for record and in making its order what volume of water actually flows in all streams, and the high and low water marks of rivers, streams and other waters of the State, affected by the waste disposal or pollution of municipalities, industries, public and private corporations, individuals, partnerships, associations, or any other entity. It shall have the authority by order and regulation to regulate, control or restrain the discharge of any waste material or polluting substance discharged or sought to be discharged into any river, stream, lake or other waters of the State. It shall have authority to prohibit any discharge resulting in pollution which is unreasonable and against the public interest in view of the existing conditions in the rivers, streams, lakes or other waters of the State.

"Section 8. That it shall be unlawful for any person to discharge or permit to be discharged into any of the rivers, streams, lakes or other waters of the State any waste or any pollution of any kind that will tend to destroy fish or other aquatic life or wild or domestic animals or fowls or be injurious to the public health or against the public welfare in violation of any rule, order or regulation of the Commission, and any person so discharging any such waste or pollution into any of

the waters of this State shall be deemed guilty of a violation of the provisions of this Act.

"Section 9. That whenever in the opinion of the Commission any person shall violate or is about to violate the provisions of this Act, or fails to control the polluting content or waste discharged or to be discharged into any waters of the State, the Commission or any representative thereof may notify the alleged offender of such determination of the Commission. Such notice may be served by any officer empowered to serve process under existing laws or by any officers or agent of the Commission. Within ten days from the receipt of notice of the determination, such persons shall file with the Commission a full report, showing what steps have been taken and are being taken to control such waste or pollution. Thereupon the Commission may make such orders as in its opinion is deemed necessary.

"In an emergency causing or likely to cause irreparable damage, or if the public interest requires, the Commission may issue a temporary order requiring that such waste disposal and such waste discharge or pollution be stopped and terminated pending a hearing provided that such temporary order shall not be effective for more than five (5) days beyond the date of hearing and in no event for more than twenty (20) days.

"Section 10. That whenever any person shall feel himself aggrieved by the restrictions of the polluting content or waste, or pollution, or any other order of the Commission, he shall have a right to file a sworn petition with the Commission, setting forth the grounds and reasons for his complaint and asking for a hearing of the matter involved. The Commission shall thereupon fix the time and place for such hearing and shall notify the petitioner thereof. At such hearing the petitioners and any other interested party may appear, present witnesses and submit evidence. Following such hearing, the final order of determination of the Commission upon such matters shall be conclusive; pro-

vided, that such order may be reviewed de novo in the district court in and for the Parish of East Baton Rouge, State of Louisiana, which said parish is declared to be the domicile of the said Commission, upon petition therefor filed within ten (10) days after the final order of determination issued by the Commission, and on such review the decree of the court shall take the place of the order of the Commission.

"Section 11. That after service of a written notice of determination, setting forth specifically any violation of this Act, any person who shall fail to make the report required in Section 9 of this Act and who is thereafter found to be continuing such violation shall be prosecuted under this Act provided, however, that pending the hearing provided for in Section 10 of this Act no criminal charges shall be filed until the termination thereof.

"Section 12. That any person found guilty of violating any of the provisions of this Act, or any written order of the Commission in pursuance thereof, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Twenty-five ($25.00) Dollars and not more than One Thousand ($1,000.00) Dollars, and costs of prosecution, or by imprisonment in the parish jail not to exceed one year or both such fine and imprisonment in the discretion of the court. Each day upon which a violation of the provisions of this Act occur shall be deemed a separate and additional violation for the purpose of this Act. The Attorney General of the State of Louisiana shall have charge of and shall prosecute all cases arising out of violation of the provisions of this Act including the recovery of penalties.

"Section 13. That wherever the word 'person' is used in this Act, it shall be construed to include any municipality, industry, public or private corporation, or co-partnership, firm or any other entity whatsoever. Wherever the words 'Waters of the State' shall be used in this Act, they shall be used to include rivers,

streams, lakes and all other water courses and waters within the confines of the State of Louisiana and also the Gulf of Mexico and other bordering waters.

"Section 14. That the Stream Control Commission is hereby authorized and directed to tax and assess against the parties involved in any hearing or application the costs incurred therein, including the cost of publication and promulgating the orders and regulations of the Commission, and to divide such costs among the parties in such proportion as is just and equitable, provided, that no more than fifty ($50.00) Dollars, in addition to the cost of publication, shall be assessed as costs against any one person, firm or corporation.

"Section 15. That should any section of this Act or provisions of same be held to be invalid by any court of competent jurisdiction the same shall not affect the validity of this Act as a whole or any part thereof other than the portion held to be invalid.

"Section 16. That all laws or parts of laws in conflict herewith are hereby repealed, provided, such repeal shall not affect any right of action of criminal prosecution heretofore accruing in favor of the State under any prior laws and, provided further, this Act shall not be construed as repealing existing laws governing the pollution of rivers, streams, lakes and other waters within the State except insofar as they are in conflict herewith but shall be construed as ancillary thereto and supplementary to the same except as they may be in direct conflict herewith and except that rulings, orders and determinations of the Commission, when made, shall prevail if in conflict with prior laws."

III. Plaintiff, The Texas Company, a Delaware corporation, engaged in the business of drilling for, producing, handling and marketing petroleum and petroleum products in the State of Louisiana, filed its complaint against the defendants, officials of the State of Louisiana and their

representatives, as members of the Stream Control Commission, an administrative commission created by said statutes and charged with the administration and enforcement thereof. Plaintiff prayed for a temporary restraining order and for an interlocutory injunction restraining the enforcement, operation and execution of said statutes by restraining the defendants from enforcing or executing their provisions and the Commission's rules, regulations and orders purportedly adopted by it pursuant to said statutes, so as to compel plaintiff to cease discharging into the coastal waters of said state, oil field brine (sometimes called "bleed-water") frequently and necessarily produced along with oil and separated therefrom above ground, in the conduct of its oil producing operations in oil fields located in water covered areas bordering upon the Gulf of Mexico and subject to its tides, and in the low, wet, uncultivable, marsh lands adjacent to such waters; and to further restrain the defendants from attempting to subject plaintiff to the criminal penalties provided for in said statutes by reason of the discharges by plaintiff of such oil field brine into such coastal waters. Plaintiff further prayed that upon final hearing, a permanent injunction of like effect be issued against the defendants and that the said statutes and the Commission's rules, regulations and orders be adjudged to be invalid and unconstitutional.

Plaintiff's application for an interlocutory injunction, as well as for a permanent injunction, was based upon the alleged unconstitutionality of said Act No. 367 of 1940 and its amendment, Act No. 199 of 1942. Plaintiff, by its complaint, contended that said statutes are null and void in that, on their face, they violate the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, and various provisions of the Louisiana Constitution. Plaintiff also attacked

the constitutionality of the Commission's rules, regulations and orders as being violative of said clauses of said Fourteenth Amendment.

IV. Briefly and summarily, the Federal grounds of plaintiff's attack upon the constitutionality of the statute, itself, are as follows:

(a) Plaintiff asserts that the statute grants to the Commission unlimited, uncontrolled and undefined powers, and, therefore, arbitrary and capricious power, in violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution.

The statute, regulatory and criminal in nature, undertakes (Sec. 3) to vest the Commission with power to prevent pollution "*tending* to destroy fish life, or to be injurious to the public health or to the public welfare or to other aquatic life or wild or domestic animals or fowls", but (Sec. 5) expressly does not deprive the State Board of Health of its powers "under existing laws" regarding matters "*directly* affecting" the public health. It confers upon the Commission, in express terms (Sec. 7), the power to establish "such pollution *standards*" as the Commission "shall deem necessary", and the power, "by order and regulation to regulate, control or restrain the discharge of any waste material or polluting substance", and the power "to prohibit any discharge resulting in pollution which is *unreasonable* and against the public interest in view of the existing conditions in" the waters. It further empowers the Commission (Sec. 3) to make and promulgate "such rules and regulations" as the Commission "may deem necessary to carry out" the statute. It permits the Commission (Sec. 3) to make its rules and regulations of general application effective in parishes (the Louisiana equivalent of counties) selected by the Commission, by publishing such rules and regulations in a newspaper in the parish or

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parishes which the Commission considers to be "affected", or, in the Commission's discretion, to make such rules and regulations effective against individuals selected by the Commission, and not others, by dispensing with newspaper publication in the parishes and giving "actual notice" of such rules and regulations to the persons whom the Commission determines to be the "parties affected". It (Sec. 8) makes the discharge of "any waste or any pollution of any kind that will *tend* to destroy fish or other aquatic life or wild or domestic animals or fowls or be injurious to the public health or against the public welfare in violation of any rule, order or regulation of the Commission", unlawful and "a violation of the provisions of this act", punishable (Sec. 12) by fine, imprisonment, or both, each day's violation being "a separate and additional offense". It is further enacted (Sec. 16) that the statute is ancillary to and supplemental of prior laws, except those in direct conflict with its provisions which are repealed, but it then provides that "rules, orders and determinations of the Commission, when made, shall prevail if in conflict with prior laws".

The statute, therefore, does not contain a declaration of policy, does not prescribe any rules of conduct to circumscribe or define the limits of the Commission's powers and does not establish any standards to govern and control the Commission in the execution or enforcement of the statute; in fact, it empowers the Commission to fix its own standards. Moreover, the statute confers on the Commission the power, unlimited except by the Commission's own discretion, to select localities within which it will make operative its rules and regulations, and, therefore, make operative the provisions of the statute. It further confers on the Commission similar unlimited power to select the persons as to whom it will make its rules and regulations effective.

Consequently, this statute authorizes the Commission to exercise arbitrary and capricious power, in violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution. The facts admitted of record disclose that the Commission has so construed and sought to enforce this statute.

(b) Plaintiff asserts that the statute, by its express terms, permits the Commission's administrative rules, regulations and orders, the violation of which constitutes a criminal violation of the statute, to become final and effective without due notice, or an adequate hearing or judicial review. The statute, therefore, violates the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution.

The statute does not, by its own terms, prohibit the discharge of waste. The only prohibited discharges (Sec. 8) are those made "in violation of any rule, order or regulation of the Commission", which discharges are made unlawful by Section 8 and punishable by fine, imprisonment, or both, under Section 12; each day on which any such discharge occurs being made a separate and additional offense. No provision is made for notice, hearing or judicial review *before* such "rules, orders or regulations" are adopted or become effective, or *before* the criminal penalties for making discharges in violation thereof attach. The so-called "notice of determination" provided by Section 9 is not the notice envisaged by the Constitution when applied to antecedent discharges, such as are here involved. Here the notice provided for by Section 9 was served on plaintiff, charging that it had, prior to the date of the notice, discharged bleed water in violation of general rules and regulations of the Commission theretofore adopted and had, therefore, violated the statute. The result is that in this case those rules and regulations had been adopted,

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became effective, been violated, and the criminal penalties had attached, though no notice had been given, hearing had, or review afforded prior to the date on which such rules and regulations became effective.

Though Section 10 purports to authorize a person aggrieved to apply for a hearing before the Commission and a trial *de novo* before a state district court, this hearing and trial do not satisfy the requirements of the Fourteenth Amendment when applied to such antecedent discharges. In such cases, the hearing and trial *de novo* are not allowed until *after* the offense resulting from such antecedent discharge is complete and the criminal penalties provided by Section 12 have even attached. The statute does not provide that such penalties shall not accrue or that they shall be suspended during this hearing and trial *de novo*. Section 11 does not refer to offenses arising under Section 8, i.e., discharges in violation of a "rule, order or regulation" of the Commission. It refers only to the offense of failing to file the report required by Section 9 under the conditions stated in Section 11. Even in that case the criminal penalties are not suspended, but the filing of criminal charges is merely withheld until the termination of the hearing and trial *de novo* purportedly provided in Section 10.

Therefore, the statute does not provide such notice, hearing or review as are necessary to satisfy the requirements of the Fourteenth Amendment.

(c) Even if Section 10 should otherwise be construed to provide for a hearing and review, such hearing and review are not substantial, adequate and safely available, but merely nominal and illusory, when, as here, antecedent discharges are alleged to have been made in violation of a "rule, order or regulation" theretofore adopted and made effective. This is true because (1) the cumulative criminal penalties of the statute begin to accrue at the time of such

antecedent violation and before any application can be made for a hearing or review under Section 10, and (2) they thereafter continue to accrue daily for the reason that the statute does not declare that they shall not continue to accrue or make provision for their suspension during such hearing and review. In consequence, one may avail himself of the hearing and review provided for by the statute only at the risk of incurring its drastic, excessive and daily accruing penalties should he be so unfortunate as to be unsuccessful on such hearing. Consequently such a hearing and review are beset by such deterrents that the statute does not satisfy constitutional requirements, even if otherwise adequate. The statute is, therefore, unconstitutional on its face, as being violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution.

V. The Federal grounds of plaintiff's attack upon the constitutionality of the Commission's rules, regulations and orders, to which plaintiff is sought to be subjected, are as follows:

(a) The Commission, under the express sanction of the promulgation provisions of the statute (Sec. 3) has actually made its rules, regulations and orders (couched in terms of general applicability throughout the state) operative against certain oil companies, including plaintiff, but not to other oil operators who are in the same class and are similarly situated, and in certain selected parishes, but not in other parishes of the state, although similarly situated. This, plaintiff asserts, is arbitrary and capricious action and therefore violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution; and

(b) The rules, regulations, and orders of the Commission sought to be enforced against plaintiff were adopted

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and made effective arbitrarily and without evidence, without considering any evidence, without notice and without a hearing. This, plaintiff asserts, constituted a violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution.

VI. The grounds upon which it is contended that the aforesaid Federal questions are substantial are as follows:

The state statute here involved has not been construed by any Louisiana appellate court, nor by any Federal court other than in this case. The Stream Control Commission, the agency created by and charged with the enforcement of the statute, construed the statute to mean that the Commission was authorized to adopt general rules, regulations and orders, and to make them effective, and enforceable by criminal prosecution, injunction and other proceedings, without any prior notice, hearing or review. When, under the facts hereinafter set forth, the defendants, members of the Commission, sought to enforce against the plaintiff the statute as so construed, plaintiff, attacking the constitutionality of the statute and the rules, regulations and orders of the Commission on the Federal grounds set forth above, sought injunctive relief. The three-judge district court, giving the statute a construction different from that placed upon it by the Commission, upheld the statute, denied injunctive relief and dismissed the complaint.

The facts admitted of record, disclose the following:

Oil and gas underground in the coastal area of Louisiana are usually in intimate contact with salt water, which is frequently and necessarily produced along with the oil and gas and separated therefrom above ground by mechanical devices. This salt water or brine, when separated, has no commercial value and must be disposed of. In 1941, the Commission adopted, as aforesaid, general rules and regulations, i.e., "rules governing the disposal of oil field

wastes", which it amended in 1943. Neither as originally adopted nor as amended, did the rules prohibit the discharge of oil field brines from which oil had been separated. They merely provided (Rule 7) that if and when the Commission "determined" that such discharge would "adversely affect" the waters, fish life, etc., such brine should not thereafter be discharged.

Plaintiff began extensive mineral operations in the marsh lands and adjacent waters in South Louisiana in 1929. Since then, its operations have greatly expanded and increased. At present, plaintiff conducts operations in 13 oil fields situated in low, wet, uncultivable marsh lands, and in 13 other oil fields located in water covered areas interspersed among or adjacent to such lands and bordering upon the Gulf of Mexico. In a number of these fields, it discharges this salt water or brine, separated from the oil, into canals, bayous and other waters, just as it has done since its operations began years ago. All, or practically all, of the operating companies in the coastal area follow this procedure. If plaintiff should be compelled to change its method of operations in order to cease the discharge of this salt water, such changes will necessitate the closing in of certain wells and the curtailing of production from others. This will endanger the ability of said wells to produce and will prevent plaintiff from producing approximately 22,000 barrels of oil per day, which it would otherwise produce during the period in which such wells are curtailed or shut in. Aside from the above, the actual cost of making the necessary installations will exceed $800,000.00.

In September, 1946, certain oyster fishermen complained to the State Department of Wild Life and Fisheries (which Department and its Commissioner had succeeded to the powers of the Department of Conservation and its Commissioner, in respect to wild and aquatic life, Act 328 of 1944),

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that recent mortality among their oysters had been abnormally high, and charged that said mortality was because of oil operations. The Commission, by resolution, ordered that a copy of its general rules adopted in 1941 and amended in 1943, be sent to "all oil companies operating in the coastal area of Louisiana asking that they comply with same". Plaintiff received a copy and acknowledged receipt. On November 26, 1946, the Commission, without notice to plaintiff, and without supporting evidence, but upon the insistent demand of the Department of Wild Life and Fisheries, adopted a resolution reciting that oil field brines would injure oysters and other aquatic life and prohibiting the discharge of such brine into the waters of 16 parishes in the so-called coastal area, but not including the waters in the parishes of Calcasieu, Jefferson Davis, Acadia, Assumption and Ascension, although they are situated similarly to some of the parishes named in the resolution. Based on this resolution the Commission mailed to various oil operators, including plaintiff, a written order prohibiting the discharge of oil field brine into the waters of said 16 named parishes.

On April 18 and 22, 1947, ten suits were filed by certain oyster fishermen against plaintiff and others, wherein judgments aggregating $3,485,063.86 were sought as damages to oysters and oyster beds situated in certain of the above-mentioned 16 parishes. Subsequently, by the time the application for preliminary injunction was heard, 37 additional suits were filed against plaintiff and co-defendants, in which damage to oyster beds in certain of said 16 parishes, to the extent of an additional $16,228,663.01 was claimed.

Shortly after the first ten suits were filed, the Commission held a meeting, which was attended by some oyster fishermen and some local public officials. Demands were

made upon the Commission to enforce its orders against the oil companies. Though the Commissioner of the Department of Wild Life and Fisheries stated to the Commission that he had no proof and that his biologist had no proof that oil field brine would kill oysters, the Commission, without any notice to the oil companies or any hearing, adopted a resolution, instructing its enforcement officers to enforce its general orders prohibiting the discharge of oil field brine by arrest of the employees of the operators, or by injunction, in all cases where discharges were observed by such enforcement officers, and further instructing such officers to continue to make inspections and arrests where violations were found.

Later, the Department of Wild Life and Fisheries reported alleged violations to the Commission, and the Commission, without any notice or hearing, determined that such alleged violations were in fact violations of its general rules and regulations adopted in 1941 and amended in 1943, and ordered the issuance to plaintiff and certain other oil companies of so-called "notices of determination" under Section 9 of the statute. The notice of determination served on plaintiff advised plaintiff that the Commission had "determined" that plaintiff had theretofore, on certain specific previous dates, violated its aforesaid general rules and had violated the provisions of the statute by having discharged "bleed water" in three specifically named oil fields. Certain other operators who discharge oil field brine into the coastal waters in oil fields similarly situated, and under similar conditions, were not charged with any violation as the result of having discharged bleed water. The notice of determination aforesaid, dated and served on plaintiff on June 30, 1947, demanded that plaintiff file with the Commission within ten days after receipt "a full report showing what steps have been taken and are being taken to

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control" the discharge of bleed water. Within said ten day period, plaintiff filed its complaint in this civil action to obtain a temporary restraining order and interlocutory and permanent injunctions as above set forth.

VII. The application for the interlocutory injunction was presented to the Honorable Ben C. Dawkins, sitting as Judge of the District Court of the United States, Eastern District of Louisiana. He granted the temporary restraining order (which was appropriately extended pending the hearing) and called to his assistance to hear and determine plaintiff's application for an interlocutory injunction, the Honorable Elmo P. Lee, Judge of the United States Circuit Court of Appeals, Fifth Circuit, and the Honorable Gaston L. Porterie, Judge of the District Court of the United States for the Westerin District of Louisiana. The Governor and Attorney General were duly notified as provided by Section 266 of the Judicial Code as amended.

The defendants filed a motion to dismiss and an answer. The motion alleged that plaintiff had not exhausted its administrative remedies and no order of the Commission had been entered adversely affecting plaintiff's rights. The answer alleged the statute to be valid; that no constitutional right of plaintiff was being invaded; that the statute's administrative provisions adequately protect plaintiff's rights; and that the Commission recognized the resolution of November 26, 1946 to be neither a rule nor order, but to have the effect only of placing oil companies on notice as to the deleterious effect of oil field brine on oysters and fish, and that the only applicable rules and regulations were those adopted in 1941 and amended in 1943. It further averred that defendants intended to administer and enforce the statute.

Plaintiff's application for the interlocutory injunction was heard upon the complaint, motion to dismiss, answer

and a stipulation of facts. Thereafter, for reasons stated in its written opinion, a copy of which is appended hereto, the court entered judgment decreeing plaintiff's application for an injunction to be premature and dismissing plaintiff's complaint without prejudice except to the extent of granting plaintiff a period of ten days from the signing of the decree within which to file a reply as provided in Section 9 of the statute to the notice of determination dated and served on plaintiff on June 30, 1947, and to take such other steps and to perform such other acts and things as the statute, as amended, permits it to take and perform.

The appeal prayed for is to the Supreme Court of the United States from the final decree of the three-judge district court denying, after notice and hearing, the interlocutory injunction prayed for by plaintiff and dismissing its suit, which direct appeal is expressly provided for by Section 266 of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U.S. Code, Tit. 28, Sec. 380).

In its petition for appeal plaintiff further prays for an injunction under Fed. Civil Proc. Rule 62 (c), relieving plaintiff during the pendency of its appeal from filing with the Commission the report provided for by Section 9 of the state statute.

VIII. The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

(a) To support plaintiff's assertion that the statute grants unlimited and arbitrary power to the Commission:

Union Bridge Co. v. *United States,* 204 U. S. 364;

J. W. Hampton, Jr., & Co. v. *United States,* 276 U. S. 394;

Panama Refining Co. v. *Ryan*, 293 U. S. 388;
A. L. A. Schecter Poultry Corp. v. *United States*, 295 U. S. 495;
Opp Cotton Mills v. *Administrator*, 312 U. S. 126;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Connally v. *General Construction Co.*, 269 U. S. 385;
Lanzetta v. *New Jersey*, 306 U. S. 451;
United States v. *Cohan Grocery Co.*, 255 U. S. 81;
International Harvester Co. v. *Kentucky*, 234 U. S. 216;
Smith v. *Cahoon*, 283 U. S. 553;
Weeds v. *United States*, 255 U. S. 109;
Yu Cong Ing v. *Trinidad*, 271 U. S. 500;
United States v. *Reese*, 92 U. S. 214;
United States Sugar Equalization Board v. *P. DeRonde & Co., Inc.*, 7 F. (2d) 981 (C. C. A. 3).

(b) To support plaintiff's assertion that the statute denies due notice and a safe and adequate hearing and review:

Morgan v. *United States*, 304 U. S. 1;
Roller v. *Holly*, 176 U. S. 398;
Southern Ry. Co. v. *Virginia*, 290 U. S. 190;
Shields v. *Utah I. C. R. Co.*, 305 U. S. 177;
Security Trust & Safety Vault Co. v. *City of Lexington*, 203 U. S. 323;
Central of Georgia R. Co. v. *Wright*, 207 U. S. 127;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413;
Interstate Commerce Comm. v. *Louisville & N. R. Co.*, 227 U. S. 88;
Inland Empire District Council, etc. v. *Millis*, 325 U. S. 697.

(c) To support plaintiff's assertion that the statute is invalid because of its unreasonable and excessive penalties:

Ex parte Young, 209 U. S. 123;
Oklahoma Operating Co. v. *Love*, 252 U. S. 331;
Missouri P. R. Co. v. *Tucker*, 230 U. S. 340;
Wadley S. Ry. Co. v. *Georgia*, 235 U. S. 651;
Missouri P. R. Co. v. *Nebraska*, 217 U. S. 196;
Yakus v. *United States*, 321 U. S. 414;
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19;
Natural Gas Pipeline Co. v. *Slattery*, 302 U. S. 300;
Ebeling v. *Morgan*, 237 U. S. 625;
Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290;
F. C. Henderson, Inc. v. *R. R. Commission*, 56 F. (2d) 218 (C.C.A. 5).

(d) To support plaintiff's assertion that the administrative actions of the Commission are invalid for want of evidence:

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88;
Baltimore & O. R. Co. v. *United States*, 264 U. S. 258.

(e) To support plaintiff's asserted right to equitable relief by injunction:

Columbia Broadcasting System v. *United States*, 316 U. S. 407;
Sterling v. *Constantin*, 287 U. S. 378;
Ex parte Young, supra;
Greene v. *Louisville & I. R. Co.*, 244 U. S. 499;
Western Union Telegraph Co. v. *Andrews*, 216 U. S. 165;
Carter v. *Carter Coal Co.*, 298 U. S. 238;
Graves v. *The Texas Co.*, 298 U. S. 393;
Pennsylvania v. *West Virginia*, 262 U. S. 553;

Truax v. *Raich*, 239 U. S. 33;
City Bank Farmers Trust Company v. *Schnader*, 291 U. S. 24;
Lovell v. *City of Griffin*, 303 U. S. 444;
Smith v. Cahoon, supra;
Oklahoma Natural Gas Co. v. *Russell, supra.*

Respectfully submitted,

CHAS H. BLISH,
W. G. LASTRAPES,
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New Orleans, Louisiana,

ROBERTS C. MILLING,
L. K. BENSON,
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New Orleans, Louisiana,
Attorneys for The Texas Company, Plaintiff.

APPENDIX "A"

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

Civil Action No. 457

THE TEXAS COMPANY, *Plaintiff*,

vs.

LUTHER S. MONTGOMERY, Commissioner of Wild Life and Fisheries; et al., *Defendants*.

Original Filed: September 4, 1947

I concur (Sgd.) Ben C. Dawkins.
I concur herein (Sgd.) G. L. Porterie, U. S. D. J.

August 29, 1947.

Before Elmo P. Lee, Circuit Judge, and Ben C. Dawkins and Gaston L. Porterie, District Judges

LEE, *Circuit Judge:*

This is a bill in equity brought by The Texas Company to have Act 367 of 1940, as amended by Act 199 of 1942, creating the Louisiana Stream Control Commission, with control of waste disposal into lakes, streams, rivers, and coastal waters of the State of Louisiana, declared null and void as violative of the Fourteenth Amendment of the federal Constitution and of certain articles of the State Constitution, or, in the alternative, to have an alleged order of the Commission, dated June 30, 1947, issued pursuant to the act, declared null and void for similar reasons. The matter is before us on an application for a preliminary injunction. The defendants the personnel of the Commission, moved to dismiss the bill on the ground that plaintiff must avail itself of the administrative machinery set up under the act before resorting to the courts; then, reserving all rights under the motion, they answered denying the ma-

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terial allegations of the complaint. By agreement the motion and the application for injunction were submitted together upon the pleadings and a stipulation of facts.

The facts pertinent to the issues briefly are as follows: The Texas Company is now, and for a number of years has been, engaged in drilling for, producing, handling, and marketing petroleum and petroleum products in the State of Louisiana. The magnitude of its operations in the State is indicated by the fact that in 1946 it paid to the State of Louisiana $2,800,000 in severance taxes, and spent in the State $940,000 in acquiring leases, $14,000,000 in drilling operations, and $6,700,000 in rentals and royalties. Its operations are carried on in forty-three fields in Louisiana, six fields located in the northern parishes of the State and thirty-seven fields in the southern or coastal area of the State.

In the coastal area, oil and gas are usually found in the earth in intimate contact with salt water, and the salt water is produced along with oil and gas. At the surface, the salt water is separated from the oil by mechanical devices. From wells in the coastal area located in or near elevated dry lands, it is impounded in disposal wells or run into evaporation pits; from wells located in low marsh lands it is run into canals and bayous; and from wells located in water areas it is loosed into the open waters. All, or practically all, of the operating companies in the coastal area follow this procedure. On April 30, 1941, the Commission adopted certain general rules governing disposal of oil well wastes; on May 27, 1941, the rules were published in one issue of a daily newspaper, the official journal of the State and of the Parish of East Baton Rouge. Paragraph 5 of the rules was amended on April 19, 1943, and the amendment was published in one issue of said journal on May 15, 1943.[1] Plaintiff had no prior notice of the Commission's

[1] The pertinent parts of the rules, as amended, are as follows:

"6. No salt water shall be discharged from a lease until all oily waste has been completely separated therefrom, except in cases where the transfer of such salt water from the lease to a central treating plant has been approved in writing by the Stream Control Commission or one of its agents. Separating pits or other equally effective device, for the separation of oily wastes from oil field brine shall be constructed and operated

meetings or of the fact that rules governing disposal of oil field waste would be considered at the meetings. On September 23, 1946, the Commission considered a complaint "regarding pollution, said to cause oyster mortality in the Grand Bay Field." At that meeting the Commission by formal resolution instructed that a copy of the rules governing disposal of oil field waste be mailed to each of the companies operating in the coastal area. Thereupon a copy of the rules was mailed to each of the companies on the Commission's mailing list, including the plaintiff, and the request was made that the rules be complied with by each of them. Plaintiff, in due course, acknowledged

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in such a manner that no oily waste will be carried from the lease, except to central treating plants, and shall meet any reasonable minimum requirements set up in any particular field or lease by the Stream Control Commission. In oil field brines discharged to streams the oil content shall not exceed 30 p.p.m.

"7. No oil field brine shall be discharged into any stream, lake or other body of water, or into any ditch or surface drainage leading to any stream, lake, or other body of water, when it is determined by the Stream Control Commission that such discharge would adversely affect the palatability of a source of potable water to an appreciable degree, or would be deleterious to the public health, or to the prosecution of any industry or lawful occupation for which or in which any such waters may be lawfully used or employed, or whereby the carrying on of any agricultural pursuit may be injuriously affected or whereby the lawful conduct of any livestock industry or the use of any such waters for domestic animals may be prevented, injuriously affected or impaired, or whereby any lawful use of any such waters by the State of Louisiana, or by any political subdivision, or by any corporation, association, partnership, or person, or any other legal entity may be lessened or impaired, or materially interfered with, or whereby any fish life, or any beneficial animal or vegetable life in said waters may be destroyed, or the growth or propagation hereof prevented or injuriously affected; provided that oil-free brine may be discharged under maximum dilution ratios prescribed for any particular stream or field by the Stream Control Commission, or during any particular period in which such discharge is determined by the Commission to be free from pollution hazard, or necessary in the public interest.

"8. Wherever possible, disposition of oil field brine shall be accomplished by discharge through disposal wells to underground horizons below the fresh water level, such wells to be so drilled, cased, cemented, equipped, and operated that no fresh water horizon shall be polluted; provided that this rule shall not apply in fields or areas where it is determined by the Stream Control Commission that disposition of the brine is or may be accomplished by discharge into water bodies normally or seasonally sufficiently saline to preclude any actual or potential pollution hazard due to such discharge."

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receipt. On November 20 and 26, the Commission met to consider a petition to prohibit the discharge of oil well brine into coastal waters, and by formal resolution ordered the oil companies operating in sixteen parishes in the coastal area to cease the discharge of oil well brine and other waste into the inland waters of those parishes and into their coastal waters within the three-mile limit. A copy of this resolution was mailed to plaintiff and to the other operating companies on the Commission's mailing list. Thereafter, in December 1946 and during the first six months of 1947, the Commission at various meetings considered the deleterious effects of oil and oil well brine, or bleed waters,[2] on oysters, shrimp, and other fish life. These meetings culminated in notices of determination, under section 9 of the act, being served on or about June 30, 1947, on plaintiff and on several, but not all, of the companies discharging oil well waste into the coastal and nearby waters. In the notices, attention was directed to several apparent infractions of the Commission's rules and regulations, including the discharge of salt or bleed waters into the open waters of certain bays,[3] and all companies so notified were requested to file with the Commission, within ten days, a report of the preventive measures, if any, being taken to control the resulting pollution.[4] No opportunity was afforded the

[2] Defined by the Supreme Court of Louisiana in *Doucet* v. *Texas Co., et al.*, 205 La. 312 17 So. 2d 340, as "a substratal water of high salt content through its proximity to underlying salt domes that is separated from the oil upon its arrival at the surface and discarded, referred to scientifically as oil well brines."

[3] The discharge of salt water or oil field brine into the open waters of certain bays is the only violation involved in this suit.

[4] The pertinent parts of the notice served on plaintiff follow:

STREAM CONTROL COMMISSION

Baton Rouge, Louisiana,
June 30, 1947.

NOTICE OF DETERMINATION

To: Texas Company,
Charles H. Blish, Agent for Service,
New Orleans, Louisiana

You are hereby notified in accordance with the provisions of Section 9 of Act 367 of 1940, as amended by Act 199 of 1942, that the Stream Control Commission at a meeting of said Commission, held in Baton

plaintiff or the other companies to attend these various meetings, nor were the proceedings of the meetings published. Prior to the issuance and service of these notices of determination, oyster growers, in coastal waters into which oil well brine or bleed waters were discharged, filed numerous suits, in State and federal courts, against the plaintiff and other operating oil companies for damages to oyster life allegedly due to the discharge into the open

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Rouge, Louisiana, at its offices, June 17, 1947, upon complaints made to said Commission, has determined that the operations of the Texas Company are in violation of the provisions of "Rules Governing Disposal of Oil Field Wastes," adopted by the Stream Control Commission and as amended April 19, 1943; and of the provisions of Act 367 of 1940, as amended by Act 199 of 1942.

The specific violations referred to above are as follows:

Oil Field	*Nature of Violation*	*Date of Violation*
West Barataria	No impervious decks or gutters Bleed water overboard (Rules 4 & 7)	May 22, 1947.
•	• • • • • • •	
Golden Meadow	• • • • • • •	
	Falgout No. A. Battery. Bleed water from battery through wooden trough to skimming pit, finally into canal (Rules 6 & 7)	
•	• • • • • • •	
Lake Salvador	No impervious decks and gutters. (Rule 4). Bleed water overboard (Rules 6 & 7)	June 4, 1947.
•	• • • • • • •	

You are required within ten days from receipt of this notice of determination, to file with the Commission a full report, showing what steps have been taken and are being taken to cause cessation of the violation aforesaid and to control the condition complained of.

Attest:

By Order of the Stream Control Commission of Louisiana.

(S.) Joyce W. Ceumbolt
Secretary

(S.) Major James Brown
Chairman

The above and foregoing notice of determination served upon Charles H. Blish, agent for The Texas Company, June 30, 1947.

Frank J. Coogan.

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waters in the coastal area of oil field waste and brine. The damages alleged in these suits, now pending, aggregate several million dollars.

After receipt of the notice of determination dated June 30, 1947, plaintiff filed this action seeking injunctive relief.

The pertinent sections of the act, as amended, are set forth in a footnote.[5] No State appellate court has in-

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[5] "Section 3. That the Stream Control Commission shall have control of waste disposal, either public or private, by municipalities, industries, public or private corporations, individuals, partnerships, associations or any other entity into any of the lakes, rivers and streams of the state or any tributaries or drains flowing into any of such lakes, rivers or streams and into any of the coastal waters of the Gulf of Mexico within the territorial jurisdiction of the State of Louisiana, for the prevention of pollution thereof tending to destroy fish life, or to be injurious to the public health or the public welfare or to other aquatic life or wild or domestic animals or fowls.

"The Commission shall have authority to make and promulgate such rules and regulations and to conduct such investigations as it, from time to time, may deem necessary to carry out the provisions of this Act.

"Rules, regulations, determinations and orders of the Commission shall be promulgated by publication in one issue of a newspaper designated as the official journal of the parish or parishes affected and in one issue of the newspaper designated as the official journal of the State of Louisiana; provided that, in the discretion of the Commission, any such promulgation by publication may be confined to publication in one issue of the official journal of the State of Louisiana, and actual notice to parties affected, or, in cases where such rules, regulations, determinations and orders are applicable and of interest only to the parties affected, to such actual notice without publication.

"Section 4. That the Commission shall be authorized to bring any appropriate action in court in the name of the State of Louisiana that may appear to it to be necessary to carry out the provisions of this Act."

"Section 7. That the Commission shall establish such pollution standards for lakes, rivers, streams, and other waters of the State in relation to the public use to which they are or may be put as it shall deem necessary. It shall have the authority to ascertain and determine for record and in making its order what volume of water actually flows in all streams, and the high and low water marks of rivers, streams and other waters of the State, affected by the waste disposal or pollution of municipalities, industries, public and private corporations, individuals, partnerships, associations, or any other entity. It shall have the authority by order and regulation to regulate, control or restrain the discharge of any waste material or polluting substance discharged or sought to be discharged into any river, stream, lake or other waters of the State. It shall have authority to prohibit any discharge resulting in pollution which is unreason-

terpreted the act, and each of the questions raised must of necessity be passed on by us as of first impression.

In approaching the questions before us it is well to bear in mind (1) that the federal courts are loath to interfere with the enforcement of a rule, regulation, or order of a State board or commission where the State statute under which the State authorities act affords administrative

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able and against the public interest in view of the existing conditions in the rivers, streams, lakes or other waters of the State.

"Section 8. That it shall be unlawful for any person to discharge or permit to be discharged into any of the rivers, streams, lakes or other waters of the State any waste or any pollution of any kind that will tend to destroy fish or other aquatic life or wild or domestic animals or fowls or be injurious to the public health or against the public welfare in violation of any rule, order or regulation of the Commission, and any person so discharging any such waste or pollution into any of the waters of this State shall be deemed guilty of a violation of the provisions of this Act.

"Section 9. That whenever in the opinion of the Commission any person shall violate or is about to violate the provisions of this Act, or fails to control the polluting content or waste discharged or to be discharged into any waters of the State, the Commission or any representative thereof may notify the alleged offender of such determination of the Commission. Such notice may be served by any officer empowered to serve process under existing laws or by any officers or agent of the Commission. Within ten days from the receipt of notice of the determination, such person shall file with the Commission a full report, showing what steps have been taken and are being taken to control such waste or pollution. Thereupon the Commission may make such orders as in its opinion is deemed necessary.

"In an emergency causing or likely to cause irreparable damage, or if the public interest requires, the Commission may issue a temporary order requiring that such waste disposal and such waste discharge or pollution be stopped and terminated pending a hearing provided that such temporary order shall not be effective for more than five (5) days beyond the date of hearing and in no event for more than twenty (20) days.

"Section 10. That whenever any person shall feel himself aggrieved by the restrictions of the polluting content or waste, or pollution, or any other order of the Commission, he shall have a right to file a sworn petition with the Commission, setting forth the grounds and reasons for his complaint and asking for a hearing of the matter involved. The Commission shall thereupon fix the time and place for such hearing and shall notify the petitioner thereof. At such hearing the petitioners and any other interested party may appear, present witnesses and submit evidence. Following such hearing, the final order of determination of the Commission upon such matters shall be conclusive; provided, that such order may be reviewed de novo in the district court in and for the Parish of

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relief;[6] and (2) that while federal courts will act under certain circumstances to prevent an invasion of the constitutional rights by State authorities, although no prior attempt has been made to exhaust administrative remedies, as a general rule they will do so only where the State statute is void upon its face.[7] All parties to the litigation admit these governing principles, but they are far apart in their construction of the act and in their application of these principles thereto.

Plaintiff contends that the act, on its face, is unconstitutional, that it is violative of the Fourteenth Amendment and of the State Constitution:

Of the Fourteenth Amendment for the reasons that

(a) The statute confers upon the Commission uncontrolled and unlimited power with reference to pollution

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East Baton Rouge, State of Louisiana, which said Parish is declared to be the domicile of the said Commission, upon petition therefor filed within ten (10) days after the final order of determination issued by the Commission, and on such review the decree of the court shall take the place of the order of the Commission.

"Section 11. That after service of a written notice of determination, setting forth specifically any violation of this Act, any person who shall fail to make the report required in Section 9 of this Act and who is thereafter found to be continuing such violation shall be prosecuted under this Act provided, however, that pending the hearing provided for in Section 10 of this Act no criminal charges shall be filed until the termination thereof.

"Section 12. That any person found guilty of violating any of the provisions of this Act or any written order of the Commission in pursuance thereof, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Twenty-five ($25.00) Dollars and not more than One Thousand ($1,000.00) Dollars, and costs of prosecution, or by imprisonment in the parish jail not to exceed one year or both such fine and imprisonment in the discretion of the court. Each day upon which a violation of the provisions of this Act occur shall be deemed a separate and additional violation for the purpose of this Act. The Attorney General of the State of Louisiana shall have charge of and shall prosecute all cases arising out of violation of the provisions of this Act including the recovery of penalties."

[6] 28 Am. Jr. § 266, p. 440.

[7] 42 Am. Jur. § 200, p. 587; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Smith* v. *Cahoon*, 283 U. S. 553.

and the power to discriminate unjustly as between persons or areas to be affected by its rules and orders.

(b) It does not afford to parties affected adversely, as is plaintiff, due notice or adequate hearing.

(c) The penalties are excessive, and the administrative review set up in the act is incompetent in that the penalties of the act accrue regardless of the hearing and judicial review set out in the act.

Of the Louisiana Constitution for the reasons that

(a) It delegates to the Commission legislative powers.

(b) It purports to confer upon the Commission the power to adopt a system or code of laws.

(c) It delegates to the Commission the power to make or adopt local or special laws.

(d) It vests in the Commission powers to regulate and control mineral operations, which, under the Constitution, is vested in the Department of Conservation, and to regulate and control wild life, oysters, fish, and other aquatic life, which, under the provisions of the Constitution, are vested in the Department of Wild Life and Fisheries.

(e) It vests the Commission with power to institute suits in the name of the State of Louisiana, which, under the State Constitution, is vested only in the Governor and Attorney General.

(f) It illegally attempts to delegate to the Commission powers in matters of public health, vested under the Constitution in State, parish, and municipal boards of health.

The plaintiff further contends that, notwithstanding the unconstitutionality of the act, defendants have promulgated rules and regulations and issued orders pursuant thereto that will seriously affect its business. Defendants answering contend that the act is valid, that the administrative

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remedies amply protect the rights of those whose interests are affected, and that no constitutional right of the plaintiff is being invaded or threatened. At the threshold, therefore, we must construe the statute and then determine the question of its constitutionality.

The object of the act is to prevent the harmful pollution of the waters of the State and the coastal waters of the Gulf of Mexico within the territorial jurisdiction of the State, and, to that end, to regulate and control public and private waste disposal into any of such waters. To accomplish this purpose the Commission was created. Plaintiff argues that there is no plan or standard fixed in the act for the Commission's guidance and that the Commission is vested with discretion to approve or condemn as it sees fit. The obvious answer is that it would have been impossible for the Legislature to prescribe a formula for the Commission's guidance or to lay down rules with reference to harmful pollution, applicable to all waters: What might be harmful pollution in one body of water might not be harmful pollution in another. Of necessity, a determination of the facts of what might constitute harmful pollution was left to a fact-finding group. The Legislature was compelled to create an agency to administer the act.

Contrary to plaintiff's contention, the authority to prohibit pollution was not unlimited. The act provides (section 7) that in establishing pollution standards the Commission shall have authority to ascertain and determine what volume of water actually flows in the streams, and the high and low watermarks of the rivers, streams, and other waters of the State affected by waste disposal; to regulate, control, and restrain by rules and orders the discharge of any waste material entering a body of water; and to prohibit any discharge resulting in pollution which is unreasonable and against the public interest in view of existing conditions. Specifically, under the act, the Commission may prohibit only such discharge as will result in pollution which is unreasonable and against the public interest in view of the existing water conditions. A standard or pattern by which it may act is thus set up, that is, pollution which is unreasonable and against public interest. It is clear that the statute contemplates that the rules, regula-

tions, and orders of the Commission shall be reasonable and fair; thus, impliedly it forbids arbitrary action by the Commission.

To safeguard the rights of the public, the act affords a hearing to those who are affected. If in the opinion of the Commission any person violates or is about to violate a provision of the act, the Commission may serve notice on him of such determination, and he has ten days after receipt of the notice to file with the Commission a full report showing what steps have been or are being taken to control such pollution. Then only may the Commission make such order as it may deem necessary. If the alleged offender feels himself aggrieved, he has the right to file a petition with the Commission, setting forth the reasons for his complaint and asking for a hearing on the matter involved. Whereupon, the Commission must fix a time and place for a hearing and notify him. At the hearing the petitioner and any other interested party may appear, present witnesses, and submit evidence. After the hearing, a formal order of determination is entered, and that order is conclusive except that it may be reviewed *de novo* in the District Court for the Parish of East Baton Rouge upon a petition filed therein within ten days. On such a review, the decree of the court supersedes the order of the Commission.

It is true that section 8 makes it unlawful for any person to discharge or permit to be discharged in State waters any pollution that would tend to destroy fish or other aquatic life, or which may prove injurious to wild or domestic animals, or to the public health or welfare, in violation of a rule, order, or regulation of the Commission; and that, under section 12, any person found guilty of violating any provision of the act or any written order of the Commission shall be deemed guilty of a misdemeanor, and upon conviction fined not less than $25 or more than $1,000, and costs, or be imprisoned in the parish jail for a period not to exceed one year, or both, within the discretion of the court, and each day's violation of the act is made a separate offense for the purpose of the act; but the provisions of sections 8 and 12 must be read in the light of sections 7, 9, and 10, and when so read, it is clear that the authority of the Commission to regulate, control, and restrain the discharge of waste

material which will result in the pollution of the waters of the State is circumscribed and limited to pollution which is unreasonable and against public interest in view of the existing condition of the waters. A determination by the Commission under section 9, that a person is violating the provisions of the act and is proceeding contrary to the rules, regulations, or orders of the Commission by discharging waste materials which will result in polluting State waters unreasonably and against public interest is not final but is subject to such findings as may be made following hearings, at which the aggrieved person may present witnesses and submit evidence, first before the Commission and then *de novo* before the State court, where the final order is made. All these provisions circumscribe the compass within which the Commission may act, and assure to an aggrieved person a fair and impartial hearing.

To hold that the hearings under the act are limited in scope to a determination of whether the rules and orders of the Commission pertaining to pollution are being violated, without the right to question whether under its rules and orders "pollution," within the compass of the act, is taking place, in effect would mean holding that the Commission could arbitrarily determine that any discharge of waste material, no matter how infinitesimal, into any body of water, however large, would result in pollution. Since the act seeks to control unreasonable pollution which is against the public interest, the hearings provided necessarily relate to a determination of the existence and extent of pollution; otherwise the Commission, if so disposed, could overstep or thwart the declared purpose of the act.

The mere fact that certain operators discharging oil well brine into the waters of the coastal area, were not served with orders to desist or with notices of determination under section 9 is not proof that plaintiff and other operators so served are being unfairly or arbitrarily dealt with. Water conditions at or near the point of discharge by those served may be wholly different from conditions at the point of discharge of those not served. For instance, oyster reefs or beds where oyster life may be adversely affected may be near the one and not the other.

Pollution may result from one and may not result from the other.

" 'The modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.' 11 Amer. Juris. § 234, p. 949. 'The policy of the law favors the placing of detailed responsibility in administrative officers. The courts uphold statutes vesting such powers in such officers if it is possible fairly to do so, at least where the powers are merely ministerial.' *Ibid*, § 240, p. 955." *National Bank of Commerce v. Board of Supervisors*, 206 La. 913, 20 So. 2d 264, 270.

The provision in section 11 that any person who fails to make the report required in section 9, after service of written notice of determination, and who is thereafter found to be continuing such violation, shall be prosecuted under the act, clearly has to do with those cases where the person so notified makes no report and does not apply for the administrative relief provided for in section 10 and who is thereafter found guilty of violating the act. The provision in section 11, that, pending the hearing provided in section 10, no criminal charges may be filed until the termination thereof would indicate that where a hearing was requested it was the final order following the hearing that would determine whether the act was being violated, hence, no criminal charges would be preferred pending the hearing. Clearly, it is violation following determination under section 9 when no hearing is requested, or under section 10 when a hearing is requested that would subject the violator to the penalties of the act.

There is some merit perhaps to the contention that the act violates the State Constitution in that it vests power in the Commission to declare what conduct shall constitute a misdemeanor, a power which can be exercised only by the Legislature. Crimes in Louisiana are purely statutory. *State v. Maitrejean*, 193 La. 824, 192 So. 361. Louisiana courts have been consistent in holding that the power to determine what conduct constitutes a crime is an exclusively

legislative function which cannot be delegated to a legislatively created agency. *State v. Caster*, 45 La. Ann. 636, 12 So. 739; *State v. Billot*, 154 La. 402, 97 So. 589; *State v. Snyder*, 131 La. 145, 59 So. 44; *State v. Watkins*, 176 La. 837, 147 So. 8; *State v. Maitrejean, supra.* The Louisiana view is contrary to that taken by the Supreme Court of the United States: In that Court, the right of Congress to provide criminal redress for violations of regulations through officers of administrative bodies to which Congress has delegated certain powers has been repeatedly upheld. *In re Kollock*, 165 U. S. 526; *Union Bridge Co. v. United States*, 204 U. S. 364; *United States v. Crimaud, et al.*, 220 U. S. 506. It is not necessary, however, for us to pass upon this question, as no criminal action under the act is before us, nor does the record indicate that such action is presently contemplated. An unconstitutional provision of the act does not operate to condemn the act in its entirety.

A reading of the act discloses that it does not confer upon the Commission the power to adopt a system or code of laws or to adopt local or special laws; it does not purport to deprive, nor does it deprive, the Department of Conservation or the Commissioner of Conservation of its or his duties and powers over minerals and mineral development, or the Department of Wild Life and Fisheries or the Commissioner of Wild Life and Fisheries of its or his duties and powers over wild life, oysters, fish, and other aquatic life. It reserves to the various boards of health, State and local, control over matters relating to the public health. Under sections 4 and 12, while the Commission may institute actions in the name of the State of Louisiana to carry out the provisions of the act, it must do so through the Attorney General of the State.

As previously stated, this suit was filed after a notice of determination was served upon the plaintiff (see footnote No. 4). Under section 9, this was only a preliminary step looking to the determination of whether or not the discharge of oil well brine in certain coastal waters of the State named in the notice results in unreasonable pollution of those waters. The right to be heard in determining this question is given to the plaintiff in section 10. The act stands regard-

less of its penal provisions, for the act itself provides that should any section or provision be held to be invalid by any court of competent jurisdiction such shall not affect the other provisions of the act.

On the issues before us, the act meets the test of due process of the Fourteenth Amendment and does not conflict with the prohibitions of those articles of the State Constitution cited by petitioner. The constitutional nullities pleaded are, we think, without merit.

Until a final order of determination by the State court on review of a final order by the Commission has been issued adversely affecting plaintiff's rights, its application to this court for an injunction is premature. The application for a preliminary injunction, therefore, is denied, and the plaintiff under its alternative prayer is given a period of ten days, dating from the signing of the decree herein, to file a reply, as provided in section 9 of the statute, to the notice of determination, and to take such other steps and to perform such other acts and things as said act, as amended, permits it to take and to perform.

Subject to the alternate relief thus granted, the motion to dismiss is sustained without prejudice. Proper decree may be presented.

(3206)

No. 423. TEXAS COMPANY *v.* MONTGOMERY, COMMISSIONER OF WILD LIFE & FISHERIES, ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. *Per Curiam:* The judgment is affirmed. *Chas. H. Blish* and *Robert C. Milling* for appellant. Reported below: 73 F. Supp. 527.